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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,	)	No. 11 CR 624 WHA
	)	
Plaintiff,	)	UNITED STATES' SENTENCING
	)	MEMORANDUM
v.	)	
	)	Sentencing: April 3, 2012 at 2:00 pm
JOSH LEO JOHNSON,	)	
	)	
Defendant.	)	

Defendant Johnson stands before this Court to be sentenced on his conviction for wire fraud in violation of Title 18 U.S.C. Section 1343. There is a plea agreement in this case, entered into pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), which calls for a guidelines sentence but permits the parties to argue for any sentence within that range -- whether low, mid, or high. Consistent with that agreement, and consistent with the Probation Officer's recommendation, the United States submits this sentencing memorandum<sup>1</sup> and respectfully requests the Court impose a sentence of 16 months imprisonment, to be followed by a 3 year

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<sup>1</sup>The government regrets that it is filing this memorandum two days late. Undersigned counsel was out of the country at the time the final PSR was released and today was the first opportunity to review the final PSR.

term of supervised release with a special expanded search condition as detailed below.

The government agrees with the Presentence Investigation Report (“PSR”) and its calculation of the adjusted offense level as 12, see PSR at ¶40. The government disagrees, however, that the criminal history category is a I, see PSR at ¶49, and believes it is instead a criminal history category II, resulting in a Guidelines range of 12 to 18 months imprisonment as opposed to the PSR’s calculated range of 10 to 16 months imprisonment. Either way, the government concurs with the Probation Officer’s recommendation that a 16 month sentence is the appropriate sentence in this matter.

In sentencing the defendant, this Court must consider all of the directives set forth in 18 U.S.C. section 3553(a). *See United States v. Booker*, 543 U.S. 220 (2005). The goals of Section 3553(a) include the need:

- to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
- to afford adequate deterrence to criminal conduct;
- to protect the public from further crimes of the defendant; and
- to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2). Section 3553(a) directs the court to consider a number of additional factors, including:

- the nature and circumstances of the offense, § 3553(a)(1);
- the history and characteristics of the defendant, § 3553(a)(1);
- the kinds of sentences available, § 3553(a)(3);
- the sentencing guideline range, § 3553(a)(4);
- pertinent Sentencing Commission policy statements, § 3553(a)(5);
- the need to avoid unwarranted sentencing disparities, § 3553(a)(6);
- the need to provide restitution to any victims of the offense, § 3553(a)(7).

The United States believes that a sentence of 16 months, followed by 3 years of supervised release with a special search condition, appropriately addresses all such considerations.

The defendant is an individual who has had several run-ins with the law, having sustained four prior convictions and eight arrests. Although the convictions are not for violent conduct, or even conduct that is as serious as this Court often sees, a couple of the defendant’s prior arrests do involve the possession of dangerous weapons, see ¶¶ 56, 57, 58. In terms of his

1 convictions, the defendant has managed to have many “set aside” pursuant to California Penal  
2 Code § 1203.4. See, e.g. PSR ¶¶ 46, 47, 48. However, as the government noted in its objections  
3 to the draft PSR, the mere fact a conviction has been set aside under Section 1203.4 does not  
4 mean that the conviction does not count toward a defendant’s criminal history. Such convictions  
5 do ordinarily count despite having been “set aside.” This is well-established by the Ninth  
6 Circuit’s decision in United States v. Hayden, 255 F.3d 768 (9th Cir. 2001), which concerned  
7 precisely the Cal. Penal Code section at issue here. Hayden held that irrespective of whether a  
8 defendant’s convictions were set aside under Cal. Penal Code Section 1203.4, they still counted  
9 for purposes of the U.S. Sentencing Guidelines and the calculation of a defendant’s criminal  
10 history. See id. Although the final PSR addresses Hayden, and agrees with the government  
11 about its implications in this case, the PSR nonetheless scores the defendant a CHC I. It does so  
12 by scoring both his convictions addressed in ¶ 46 and ¶ 47 “0” for criminal history points, noting  
13 that “the defendant’s conduct in the instant federal offense occurred in May 2007.” See id. If  
14 the government understands the PSR correctly, it appears to take the view that the defendant’s  
15 December 1996 and January 1997 convictions (set forth in ¶¶ 46-47) “time out” and thus do not  
16 count because the PSR’s view is that the instant conduct occurred in May 2007. See PSR  
17 Sentencing Recommendation Justification at 1-2.

18         The government disagrees with this for two reasons. First, the charging documents and  
19 Plea Agreement in this case make clear that the defendant’s conduct took place “from  
20 approximately 2006 to 2007.” Although the defendant signed and submitted the relevant  
21 fraudulent paperwork in May 2007, that does not alter the fact that the defendant’s role in this  
22 conspiracy predates and postdates May 2007. One does not participate in a scheme to defraud  
23 mortgage lenders and commit wire fraud on a single day in time. Rather, the evidence in this  
24 case makes clear that the defendant’s involvement in this scheme took place over a period of  
25 time. And that period of time was “from approximately 2006 to 2007.” Second, the convictions  
26 at issue in ¶¶ 46 and 47 are both instances where the defendant’s probation was revoked (on  
27 4/14/97 for the conviction at issue in ¶ 46 and on 7/30/97 for the conviction at issue in ¶ 47) such  
28 that even if one were to select “May 2007” as the only operative date for the defendant’s instant

1 conduct, those would still “time in” under the 10 year period during which prior convictions  
2 count toward criminal history.

3 In sum, the government believes that the convictions contained in ¶¶ 46 and 47 do count  
4 toward the defendant’s criminal history, do not time out, and, under the teaching of Hayden are  
5 properly counted. Even if the Court only counted one of those convictions, the defendant would  
6 find himself in a CHC II. The fact that there are two such convictions is even more reason the  
7 defendant is a CHC II. As a result, the government believes the defendant’s CHC is a II and not  
8 a I, and that the correct guidelines range is 12-18 months as opposed to 10-16 months.

9 The foregoing discussion is somewhat academic, however, because the government  
10 agrees with the PSR’s bottom line: a sentence of 16 months, which is within the guidelines range  
11 regardless of whether that range is properly a 10-16 month range or a 12-18 month range.

12 The government believes a mid-range sentence of 16 months is appropriate. On one  
13 hand, the defendant’s history and characteristics counsel in favor of a sentence at the mid as  
14 opposed to low end of the range. Although his convictions are fairly outdated, the chain of the  
15 defendant’s encounters with the law has not been broken with the passage of time: Shortly  
16 before the charges in the instant case, local prosecuting authorities charged the defendant for his  
17 participation in a casino fight involving other gang members.<sup>2</sup> Those charges remain  
18 outstanding. Aside from his earlier criminal history, discussed above, the defendant’s  
19 performance while under those respective criminal justice sentences should be taken into  
20 account. For example, he had his probation revoked multiple times, including following his theft  
21 conviction, see PSR ¶ 46, and several times following his “unspecified conviction,” see ¶ 47.

22 On the other hand, the government believes that a sentence at the mid as opposed to the  
23 high end of the range is warranted given the defendant’s role in the instant offense and the fact  
24 that his criminal history is somewhat dated and non-violent. The defendant was not the  
25 instigator of the conspiracy at issue in this case, and was a minor participant (something that the  
26 Plea Agreement has already rewarded the defendant for, given its awarding of points for a minor  
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28 <sup>2</sup>The defendant holds a leadership position in the Hells Angels Motorcycle Club.

1 role reduction). Apart from that, the defendant actually tried to keep up the payments on the  
2 property to keep it from going into foreclosure. The defendant was essentially a pawn whose  
3 good credit was used – albeit with his consent – by others to perpetrate the mortgage fraud  
4 conspiracy at issue. These factors counsel in favor of a mid range sentence.

5 A 3 year term of supervised release is sought. Because of the defendant's criminal  
6 history, and in order to assist with his rehabilitation, the government requests that consistent with  
7 the plea agreement the following special search condition be imposed as part of the defendant's  
8 supervised release:

9 Special Condition (Searches)

10 The defendant shall submit his person, property, place of residence,  
11 vehicle, and personal effects to search at any time of the day or night,  
12 with or without a warrant, with or without probable cause, and  
13 with or without reasonable suspicion, by a probation officer or any  
federal, state, or local law enforcement officer. Failure to submit to  
a search may be grounds for revocation. The defendant shall  
warn any residents that the premises may be subject to search.

14 For all of the reasons discussed herein and consistent with the parties' agreement, the  
15 government submits an appropriate sentence is 16 months imprisonment to be followed by a 3  
16 year term of supervised release with a special search condition. The government does not  
17 oppose the defendant's voluntary surrender.

18 Dated: March 29, 2012

Respectfully submitted,

19 MELINDA HAAG  
20 United States Attorney

21 \_\_\_\_\_/s/  
22 KATHRYN R. HAUN  
23 Assistant United States Attorney  
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